STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of DANILLIE M. HATMAKER,
Minor.

DEPARTMENT OF HUMAN SERVICES, f/k/a FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

MARK ANTHONY HATMAKER,

Respondent-Appellant.

UNPUBLISHED
May 11, 2006

No. 264670
Wayne Circuit Court
Family Division
LC No. 01-404694-NA

Before: Jansen, P.J., and Neff and Zahra, JJ.

PER CURIAM.

Respondent Mark Anthony Hatmaker[1] appeals as of right the order terminating his parental rights to the minor child. We affirm.

A petitioner need establish only one statutory ground for termination of parental rights by clear and convincing evidence. MCL 712A.19b(3); *In re JK*, 468 Mich 202, 210; 661 NW2d 216 (2003); *In re Powers Minors*, 244 Mich App 111, 117; 624 NW2d 472 (2000). Respondent was convicted of third-degree criminal sexual conduct, MCL 750.520d (person 13 to 16 years of age). That offense is specifically enumerated in MCL 712A.19b(3)(n). Therefore, in order to establish grounds for termination, petitioner was only required to prove that terminating respondent's parental rights was in the minor child's interests because a continuation of the relationship would have been harmful to the minor child. MCL 712A.19b(3)(n).[2]

[1] The correct spelling of respondent's name is apparently "Marc Anthony Hatmaker." However, he is listed as "Mark Anthony Hatmaker" in this Court's records.

[2] Contrary to respondent's suggestion, MCL 712A.19b(3)(n) does not violate equal protection because it does not treat similarly situated persons differently, and because it is narrowly tailored to serve the compelling state interest of protecting children from unreasonable harm. See *In re AH*, 245 Mich App 77, 82-84; 627 NW2d 33 (2001).

Third-degree criminal sexual conduct does not necessarily include the element of force. See MCL 750.520d. However, here the victim described the intercourse as forced. Moreover, the victim was respondent's cousin. For the purposes of child protective proceedings, the court is entitled to find that a respondent committed a crime by a mere preponderance of the evidence. *In re MU*, 264 Mich App 270, 283-284; 690 NW2d 495 (2004). Thus, based on the unique facts surrounding respondent's conviction, the court was justified in finding that the offense for which respondent was convicted likely included elements of violence or coercion.

In addition, respondent's description of the events surrounding the criminal sexual conduct conviction were unbelievable. Respondent indicated that the victim initiated the sexual contact and that he quickly terminated the encounter. However, the other evidence presented to the trial court did not substantiate these assertions. The trial court was therefore justified in finding that respondent had failed to accept responsibility for his actions.[3]

Respondent correctly observes that it was often unclear which caseworker was assigned to this case. However, respondent made no efforts to determine the identity of the specific caseworkers assigned to the case or to otherwise communicate with petitioner. Respondent similarly failed to make efforts to follow court instructions, to notify the proper parties of his whereabouts, and to sign releases authorizing the disclosure of treatment and counseling information. We recognize that respondent was unable to fully take part in these proceedings during his term of incarceration. However, he had the ability to more fully participate in the proceedings after his release on parole. Nonetheless, the trial court correctly noted that even after his release, respondent was largely "sleepwalking" through the proceedings.

Based on the facts surrounding respondent's criminal conviction, respondent's drug use, and respondent's limited efforts to take responsibility for his actions, resolve his problems, and fully participate in the proceedings, the trial court concluded that petitioner had shown by clear and convincing evidence that a continuation of respondent's parental rights would have been harmful to the minor child. This finding was not clearly erroneous. The trial court did not err by finding sufficient evidence to terminate respondent's parental rights under MCL 712A.19b(3)(n).

When the trial court finds that one or more statutory grounds for termination have been established, it must terminate the respondent's parental rights unless termination would be clearly against the child's best interests. MCL 712A.19b(5); *In re Trejo Minors*, 462 Mich 341, 352-353; 612 NW2d 407 (2000). There is no specific burden on either party to present evidence of the child's best interests, but the trial court should weigh all evidence available. *In re Trejo*, *supra* at 353-354. In the present case, evidence indicated that the child bonded with respondent before his incarceration and was upset when respondent's parole conditions prohibited contact. However, as discussed above, the evidence also showed the potential of harm, which would outweigh the minor child's attachment to respondent. The court did not err in finding that termination of respondent's parental rights was not clearly against the child's best interests.

[3] Respondent additionally tested positive for drug use while he was on parole, further indicating that he was unwilling to conform his conduct to the law, even when his parental rights were at stake.

Respondent also argues that he was denied effective assistance of counsel, which is a protected constitutional right in child protective proceedings. *In re CR*, 250 Mich App 185, 197-198; 646 NW2d 506 (2002). Respondent must demonstrate that his counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced him that he was denied a fair trial. *Id*. at 198, citing *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). This prejudice requires "'a reasonable probability that, but for counsel's unprofessional errors, the result would have been different.'" *Id.*, quoting *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996). Because respondent did not preserve this issue by requesting an evidentiary hearing or a new trial, we review the matter for error apparent on the record. See *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

The alleged instances of ineffective assistance in the present case were not sufficiently outcome determinative to warrant relief. Respondent asserts that the result of the proceedings would have been different had he earlier established a meaningful relationship with his attorney and had he been advised to attend all hearings, to provide a prepared answer regarding why the court should not terminate his rights, and to offer relatives as character witnesses. He also contends that his attorney should not have asked certain questions, which allegedly "opened the door" to whether he had satisfied his parole conditions and paid outstanding fines. However, because the lower court was focused on respondent's conviction for criminal sexual conduct, his failure to support his daughter since his release from prison, and his drug use, we cannot conclude that the result would have been different had these instances of alleged ineffective assistance not taken place. The attorney's actions did not deprive respondent of effective assistance of counsel. See *In re CR*, *supra* at 198.

Respondent also argues that the trial court should have granted his request to adjourn the trial when he was unable to obtain transportation. Citing *Santosky v Kramer*, 455 US 745, 753-754; 102 S Ct 1388; 71 L Ed 2d 599 (1982), respondent argues that the state must provide "fundamentally fair" procedures when terminating parental rights. It is true that a respondent has the right to be present at a termination hearing. MCR 3.973(D)(2). However, the court can proceed in the respondent's absence so long as he received proper notice. MCR 3.973(D)(3). The court cannot prevent a respondent from attending; however, it does not have a duty to secure a respondent's attendance. *In re Vasquez*, 199 Mich App 44, 49; 501 NW2d 231 (1993). In the present case, the court did not prevent respondent from attending. Instead, only his inability to find transportation prevented him from attending. Further, even though he was physically absent, respondent adequately participated in the proceedings by speakerphone. The trial court should grant an adjournment in a child protective proceeding only for good cause, after considering the child's best interests. MCR 3.923(G). Respondent's inability to find private or public transportation to the courthouse was not good cause, especially when he was able to participate by speakerphone.

Finally, respondent argues that he was unfairly prejudiced when the court allowed hearsay evidence regarding the contents of the agency file. Although the rules of evidence apply at the adjudicative stage of child protective proceedings, they generally do not apply at the dispositional stage. MCR 3.977(G)(2); *In re Gilliam*, 241 Mich App 133, 136-137; 613 NW2d 748 (2000). However, if the petitioner seeks termination based on new or changed circumstances, the petitioner must use legally admissible evidence. MCR 3.977(F)(1)(b); *In re*

Gilliam, *supra* at 137. Here there were no new substantive allegations, and the circumstances had not changed for the purpose of admitting evidence. The trial court did not err when it allowed the caseworker's testimony regarding the contents of the agency file.

Termination of respondent's parental rights was proper under MCL 712.19b(3)(n). In light of our analysis, we need not address whether the trial court's decision was also supported by additional statutory factors.

Affirmed.

/s/ Kathleen Jansen
/s/ Janet T. Neff
/s/ Brian K. Zahra